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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 173

GULF REFINING COMPANY,
Petitioner,

versus

BLACK WARRIOR TOWING COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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To the Honorable the Chief Justice and the Associate Justices of the United States:

Gulf Refining Company (hereinafter referred to simply as Gulf) prays that a writ of certiorari issue out of this Court to review the judgment of the Court of Appeals for the Fifth Circuit dated February 20th, 1956, wherein a rehearing was denied on April 6th, 1956.

I.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court is printed in full in the record, p. 841, and is reported in 127 F. Supp. 469, 1955 AMC 197. The opinion of the Circuit Court of

Appeals printed in Appendix A hereto, *infra* p. 23, is reported in 230 F. 2d 346.

II.

JURISDICTION

This is a proceeding in Admiralty under Article III, Sec. 2 of the Constitution of the United States originally filed in the United States District Court for the Eastern District of Louisiana.

The opinion of the Court of Appeal was entered on February 20th, 1956, and Gulf's petition for a rehearing was denied on April 6th, 1956.

The jurisdiction of this Court to review this case on certiorari is invoked under 28 U.S. Code, Sec. 1254(1).

III.

THE QUESTIONS PRESENTED FOR REVIEW

This petition presents only questions of law on four grounds, namely:

(1) The Court of Appeal denied recovery over by Gulf against Black Warrior under the 56th Admiralty Rule. Under this Court's holding in *Ryan Stevedoring Co., Inc. vs. Pan Atlantic Steamship Corporation* decided January 9th, 1956, 350 U.S. 124, Gulf should be allowed indemnity over against Black Warrior under the 56th Admiralty Rule for breach of contract pursuant to the terms of the private contract of carriage, Appendix B hereto, *infra*, p. 43, which recovery over the Court of Appeal denied.

(2) The Court of Appeal has rejected the facts

found by the District Court and has decided contrary to Judge Wright's findings of fact that (a) Lamy was not guilty of negligence, and (b) Morrissette was not guilty of negligence, and declared both free from negligence without manifest error, contrary to the rule announced in the decision of this Court in *McAllister vs. U. S.*, 348 U.S. 19, 75 Sup. Ct. 6 (1948).

(3) The defense of the Fire Statute was improperly considered, being invoked for the first time on appeal.

(4) In view of the negligence of Lamy, the Company's top agent on the scene, the Fire Statute should not apply under the decisions of this Court in *The Gallileo, Earl Stoddard vs. Ellerman's Wilson Line*, 287 U.S. 420, 53 Sup. Ct. 200 (1932).

IV.

STATUTES INVOLVED

This case involves Admiralty Rule 56, the U. S. Fire Statute, 46 U.S. Code 182, printed in Appendix C, *infra* p. 49, and the Louisiana Civil Code Article 2315 concerning the right of survivorship in death action, printed in Appendix D, *infra* p. 50.

V.

SUMMARY STATEMENT

A great fire and resulting explosions on a gasoline barge at the Gretna Terminal of Gulf Refining Company on the West Bank of the Mississippi River opposite New Orleans in the early morning of May 11th, 1952, is the basis of this litigation. Claims for property damage, personal injury damages and damages for wrongful death were filed in the United States District Court for the

Eastern District of Louisiana, sitting in Admiralty under Article 3, Sec. 2 of the Constitution of the United States, which proceedings are listed in Appendix E, *infra* p. 52.

Pursuant to a written contract of private carriage, Appendix B, *infra* p. 43, Black Warrior Towing Company (hereinafter referred to simply as Black Warrior) was discharging and delivering to the Gulf Terminal three barges loaded with gasoline belonging to Gulf, which Black Warrior had towed from Texas City, Texas, with its diesel tug M/V REBEL WARRIOR. Black Warrior owned and operated the tug and all three barges. Gulf's terminal had a dock facility for loading and unloading liquid fuel, constructed of four steel barges, end on end, parallel to the shore, over which ran pipe lines to connect its shore tanks to water craft, as is shown in detail on Exhibit Gulf 1-a, Appendix F, *infra* p. 59.

As the tow approached the terminal, all barges were fully loaded and sat low in the water with a tilt to stern. The tug moored the barges 107 and 109 upstream and the 112 at the downstream end of the dock, R. 201, 251. The 112 started pumping gasoline at 5:30 A.M. with its own pumps. Then, after servicing air to the 107, the tug was moored to the starboard quarter of the 109 near the stern of the barge, and remained in that position until the fire.

Shortly before 6:15 A.M. the tug's diesel cook stove was burning in the galley on her port side, on which breakfast had been prepared, and which stove had been burning for an indefinite time, perhaps several days. Several feet away on the starboard outboard end of the 109 was located the all important open end of her discharge line. The watertight galley door which opened

outwardly on the port side of the tug was open, but the screen door which opened inwardly, was closed. At about 6:15 A.M. a large blue flash occurred on the stern end of the 109, followed immediately by fire and explosions which damaged the barges, their gasoline cargo, the tug, and Gulf's terminal. Three men lost their lives.

Black Warrior and its underwriters sued Gulf and Gulf sued Black Warrior for property damage. Three suits were filed for damages for deaths, one of which was settled before trial. Three suits were brought for personal injuries.

On the trial before Honorable J. Skelly Wright, Gulf contended that two acts of gross negligence by Black Warrior and its representatives and employees were the proximate cause of the accident, namely (a) allowing the lighted galley range to burn near a discharging gasoline barge, and (b) allowing the open end of the discharge line to remain uncapped. Black Warrior on the other hand contended that the sole cause of the fire was the negligence of a Gulf employee, Villa LeBlanc, in opening a shore valve, thus permitting gasoline to run down through the pipeline system on the 107 and 109, and then out through the open end of the discharge line. The District Court's decree on the question of liability, R. 841, found both Black Warrior and Gulf at fault and rendered a judgment of divided damages on the property damage claim. Judge Wright found contributory negligence by the surviving personal injury claimants, Curry and Thomas who sued Gulf and the damages were accordingly apportioned, R. 855, 856, but denied recovery over by Gulf against Black Warrior. He denied the two claims for wrongful death, because of contributory negligence being a complete defense under the State law, R. 854.

The matter was appealed to the Court of Appeal for the Fifth Circuit, which affirmed Judge Wright on the question of negligence as to the personal injury claims of Curry and Thomas, and also as to the property damage claims except as to cargo, but reversed and remanded the death claims on the ground that the two decedents, Lamy and Morrissette, were not guilty of negligence. As a corrollary, the Court also remanded as to Gulf's cargo damage claim, on the defense of the U.S. Fire Statute, 46 U.S. Code 182, which defense was raised for the first time on appeal.

There was one record on appeal containing the transcript of testimony, and exhibits. There were separate records of the pleadings.

VI.

REASONS FOR GRANTING THE WRIT

(1)

The Court of Appeal erred in denying recovery over in contract, and departed from this Court's decision in the Ryan Stevedoring Company Case.

Under the contract of carriage between Gulf and Black Warrior, Appendix B hereto, *infra* p. 43, Gulf claims indemnity because Back Warrior has breached its duty and its implied obligations to Gulf to furnish a seaworthy vessel and a competent captain and crew to carry on the unloading operations under said contract in a competent, prudent and safe manner under *Ryan Stevedoring Co., Inc. vs. Pan-Atlantic S.S. Corp.*, 350 U.S. 124. Competence and safety were inescapable elements of the service undertaken under that decision by this Court.

The obligation of Black Warrior was not a quasi-

contractual obligation implied in law or arising out of a non-contractual or mere delictual relationship; the obligation was the essence of the said contract of carriage. It was Black Warrior's warranty of workmanlike service.

The Court of Appeal found that Black Warrior breached its duties to Gulf and held that it would not overrule the finding of the lower Court that Black Warrior was negligent in not blanking off the outboard discharge line of the 109, and by permitting the galley fire to burn in close proximity to the discharge operation, Appendix A, *infra* p. 23. The Court of Appeal also clearly found that the 109 was unseaworthy, which in itself constitutes failure on the part of Black Warrior to carry out its contract reasonably, prudently and safely, with proper equipment and proper manpower.

Yet, the Court of Appeal denied recovery by way of indemnity on the grounds that Gulf has no right to *contribution* from Black Warrior, its *joint tort feasor*, in a non-collision maritime injury case, under the doctrine of *Halcyon Lines vs. Haenn Ship Corp.* 342 U.S. 282, 72 S. Ct. 277, 96 L. Ed. 318 (1952).

We respectfully submit that the Court of Appeal is in error, *First*, in interpreting the contention of Gulf as being a plea for contribution and not for indemnity; *Second* in applying the *Halcyon Lines* decision, *supra;* and *Third*, in not applying the doctrine of *Ryan Stevedoring Co., Inc. vs. Pan-Atlantic Steamship Corporation*, 350 U.S. 124.

As stated hereinabove, Gulf's prayer for indemnity under admiralty Rule No. 56 is predicated upon the existence of the contract between Gulf and Black Warrior, and is not based on tort.

As the result of the failure on the part of Black Warrior to carry out its contract and to fulfill the implied obligations and duties growing out of said contract with competence and safety, Gulf, under the opinion of the Court of Appeal, shall sustain serious losses as follows:

(1) Hartford Accident and Indemnity Company seeks recovery of substantial amounts paid and to be paid to Lamy's representatives under the Longshoremen and Harbor Workers' Act. Hartford, as the insurer of Black Warrior, stands in the shoes of Black Warrior in this transaction.

Under that Court's judgment Black Warrior is being permitted to recover through its insurer in a transaction in which Black Warrior was grossly negligent and in which Black Warrior failed to carry out its contract properly.

(2) Black Warrior, as the record shows, has settled with Morrissette's representatives and with Thomas and Curry under the "Jones Act," with the agreed stipulation that Black Warrior shall recover its payments to these respective parties from whatever monies are recovered herein by said individual parties.

Under the judgment of that Court, Black Warrior is being permitted to be made whole in this transaction, notwithstanding its gross negligence and the failure to carry out its contract properly.

Gulf contends that the law of the Supreme Court as set out in the case of *Ryan Stevedoring Company, Inc. vs. Pan-Atlantic Steamship Corporation, supra,* decided on January 9, 1956, (and not available in text to the Fifth

Circuit at the time the instant case was argued on the original hearing) is controlling and entitles Gulf to indemnity over against Black Warrior under the implied obligations growing out of the private contract of carriage for all amounts which it may be called upon to pay in these various actions brought by Black Warrior, Hartford, Thomas, Curry and Morrissette's representatives.

In the *Ryan* case this Court granted indemnity to Pan-Atlantic, operator of a steamship, under the following circumstances:

Ryan loaded the S S CANTON VICTORY, as stevedore. Thereafter, the ship completed a voyage from the point of embarkation, in South Carolina, to Brooklyn, New York. While unloading the vessel, Palazzolo, an employee of Ryan, was injured. He elected to sue Pan-Atlantic and recovered under the doctrine of unseaworthiness of the vessel. Pan-Atlantic sought indemnity over against Ryan. Ryan claimed that the Longshoremen's Act precluded a claim against it, for said Act was its sole responsibility in the premises. The lower Court denied indemnity. The Court of Appeals reversed the lower court and permitted indemnity, under a theory of primary, active negligence as contrasted to secondary or passive negligence.

This Court permitted indemnity on an entirely different theory, which will be set out hereinafter, and decided that the Longshoremen and Harbor Workers' Compensation Act did not preclude a shipowner from asserting such a liability, and, secondly, that liability does exist where a contractor, without entering into an expressed agreement of indemnity, contracts to perform certain operations and the injured party's injuries are caused by

the contractor's unsafe acts.

The Supreme Court declared:

> "In the face of a formal bond of indemnity this statute (U.S. Longshoremen's Act) clearly does not cut off a shipowner's right to recover from a bonding company the reimbursement that the indemnitor, for good consideration, has expressly contracted to pay. Such a liability springs from an independent contractual right. It is not an action by or on behalf of the employee and it is not one to recover damages 'on account of' an employee's 'injury or death.' It is a simple action to recover, under a voluntary and self-sufficient contract, a sum measured by foreseeable damages occasioned to the shipowner by the injury or death of a longshoreman on its ship.
>
> "A like result occurs where a shipowner sues, for breach of warranty, a supplier of defective ship's gear that has caused injury or death to a longshoreman using it in the course of his employment on shipboard. And a like liability for breach of contract accrues to a shipowner against a stevedoring contractor in any instance when the latter's improper stowage of cargo causes an injury on shipboard to some one other than one of its employees. The coincidence that the loading contractor here happens to be the employer of the injured longshoreman makes no difference in principle. While the Compensation Act protects a stevedoring contractor from actions brought against it by its employee on account of the contractor's tortious conduct causing injury to the employee, the contractor has no logical ground for relief from the full consequences of its independent contractual obligation, voluntarily assumed to the shipowner, to load the cargo properly. See *American Stevedores vs. Porello*, 330 U.S. 446; *Crawford vs. Pope & Talbot*, 206 F. 2d 784, 792-793; *Brown vs. American-Hawaiian S.S. Co.*, 211 F.

2d 16; *Rich vs. United States*, 177 F. 2d 688; *United States vs. Arrow Stevedoring Co.*, 175 F. 2d 329.

"The shipowner's action here is not founded upon a tort or upon any duty which the stevedoring contractor owes to its employee. The third-party complaint is grounded upon the contractor's breach of its purely consensual obligation owing to the shipowner to stow the cargo in a reasonably safe manner. Accordingly, the shipowner's action for indemnity on that basis is not barred by the Compensation Act.

* * * * *

"The answer to this is found in the precise ground of the shipowner's action. By hypothesis, its action is not based on a bond of indemnity such as it may purchase by way of insurance, or may require of its stevedoring contractor, and which expressly undertakes to save the shipowner harmless. If the shipowner did hold such an express agreement of indemnity here, it is not disputed that it would be enforceable against the indemnitor. *On the other hand, the shipowner's action for indemnity here is not based merely on the ground that the shipowner and contractor each is responsible in some related degree for the tortious stowage of cargo that caused injury to Palazzolo. Such an action, brought without reliance upon contractual undertakings, would present the bald question whether the stevedoring contractor or the shipowner, because of their respective responsibilities for the unsafe stowage, should bear the ultimate burden of the injured longshoreman's judgment. That question has been widely discussed elsewhere in terms of the relative responsibility of the parties for the tort, and those discussions have dealt with concepts of primary and secondary or active or passive tortious conduct. Because Respondent in the instant case relies en-*

tirely upon petitioner's contractual obligation, we do not meet the question of a noncontractual right of indemnity or of the relation of the Compensation Act to such right.

"The shipowner's claim here also is not a claim for contribution from a *joint tort feasor.* Consequently, the considerations which led to the decision in *Halcyon Lines vs. Haenn Ship Corp.*, 342 U.S. 282, are not applicable. See *American Mutual Liability Ins. Co. vs. Matthews*, 182 F. 2d 322.

"The shipowner here holds petitioner's uncontroverted agreement to perform all of the shipowner's stevedoring operations at the time and place where the cargo in question was loaded. That agreement necessarily includes petitioner's obligation not only to stow the pulp rolls, but to stow them properly and safely. Competency and safety of stowage are inescapable elements of the service undertaken. This obligation is not a quasi-contractual obligation implied in law or arising out of a non-contractual relationship. It is of the essence of petitioner's stevedoring contract. It is petitioner's warranty of workmanlike service that is comparable to a manufactured product. The shipowner's action is not changed from one for a breach of contract to one for a tort simply because recovery may turn upon the standard of the performance of petitioner's stevedoring service."

(Emphasis and parenthesis supplied)

In view of the foregoing decision, Gulf claims full indemnity against Black Warrior and the M.V. REBEL WARRIOR.

In the alternative, should this Court in its judgment see fit to modify the *Ryan* decision in its application to these facts by reason of any negligence on the part of Gulf, the existence of which is denied, Gulf contends and

submits that the Court should permit indemnity over on an apportionment-of-damages basis.

That is to say, we contend, as an alternative, that should this Court find Gulf to have been negligent to the extent of fifty (50%) per cent, then Gulf should be entitled to indemnity over to the extent of fifty per cent. of the loss sustained in this transaction.

It would be inequitable to permit Black Warrior to be fully released from responsibility to the tort claimants such as Thomas, Curry, Morrissette and Hartford and, further, to recover by way of subrogation or otherwise against Gulf, when the negligence of Black Warrior was the predominating cause of the losses sustained as a result of this accident. In no event should Gulf be called upon to bear the full and entire economic burden of these claims.

(2-a)

The District Court's Finding that Lamy was negligent is final, and it was error for the Court of Appeals to reverse, there being no manifest error.

The District Court's opinion was amply supported by the evidence. As such there was no manifest error and the Court of Appeal should not have found otherwise. The Court of Appeal acted contrarily to this Court's decision in *McAllister vs. U. S.*, 348 U.S. 18 (1948). In that case, this Court declared:

> "The first question presented is whether the Court of Appeals in reviewing the District Court's findings applied proper standards. In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly er-

roneous. No greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52(a) of the Federal Rules of Civil Procedure."

* * * * *

"On evidence showing these facts, including the opinion of the experts, we think there was substantial evidence from which the District Court could and did find that respondent was negligent in permitting these Chinese, from the infested area of Shanghai, to have the run of the ship and use of its facilities, and in furnishing the crude and exposed latrine provided on the deck of the ship, by reason whereof the petitioner contracted polio.

Of course no one can say with certainty that the Chinese were the carriers of the polio virus and that they communicated it to the petitioner. But upon balance of the probabilities it seems a reasonable inference for the District Court to make from the facts proved, supported as they were by the best judgment medical experts have upon the subject today, that petitioner was contaminated by the Chinese who came aboard the ship November 11, 1945, at Shanghai. Certainly we cannot say on review that a judgment based upon such evidence is clearly erroneous. *Myers vs. Reading Co*, 331 U.S. 477, 485-486; *Tennant vs. Peoria & P.U.R. Co.*, 321 U.S. 29. We think it was an allowible judgment of the District Court, and the judgment of the Court of Appeals is

Reversed."

The Court of Appeal recognized this rule in this case when it stated, "We cannot set aside (this) finding of fact unless it was clearly erroneous." 230 F. 2d 354, and at p. 351 declared "we cannot therefore, hold that such finding by the Trial Court was clearly erroneous."

Yet the Court of Appeal in the case at bar did reverse on fact without any manifest error on the part of the District Court, as to the Lamy and Morrissette claims.

The District Judge found (R. 854):

> "The evidence shows that Lamey was not a member of the crew of the REBEL WARRIOR. He was a shoreside employee of Black Warrior, who supervised the entire discharge operations for that Company. Under the circumstances, the negligence of Black Warrior, as shown above, was at least partially the negligence of Lamey, *for it was he who allowed the discharge operation to begin without blanking off the outboard end of the discharge line of the 109, and it was he who allowed the REBEL WARRIOR, with the open fire in her galley, to come alongside the 109 in the vicinity of the outboard end of the discharge line.*"
>
> (Emphasis supplied)

The Court of Appeal reversed on this point and stated:

> "The trial court found, however, that Lamey also was negligent, 'for it was he who allowed the discharge operation to begin without blanking off the outboard end of the 109'. On the other hand, as noted above, Dunaway's uncontradicted testimony was that he and Lamey checked the flanges on the 112 before beginning the discharge operation there, and were preparing to do the same on the 107 and the 109 when the explosion occurred. There was no evidence that Lamey knew of the absence of the flange, but there is evidence that he would have checked it before starting the pumps or authorizing LeBlanc to open the dock valve. The trial court thus imposed a duty on Lamey to make a complete inspection of the barges, for unseaworthiness, immediately on coming aboard to conduct discharge operations. We cannot agree that it was a breach of due care on

Lamey's part to postpone his inspection of the equipment he was to use until immediately before he was prepared to use it. He could not reasonably be required to foresee, in other words, that from the moment he came aboard the barges in the morning, a condition existed, and had existed before their arrival, which imperiled the lives of the entire crew. The fault for leaving the discharge line unflanged lay, as we have said, with the master or the pilot; and in the light of the usual warranty of a vessel's seaworthiness at the beginning of a voyage, *The Caledonia*, 157 U.S. 124, 15 S. Ct. 502, 39 L. Ed. 613, we see no reason why Lamey should have presumed the fact to be otherwise."

* * * * *

" * * * The port engineer was the shoreside employee *solely responsible* for the discharge operations, but although those operations required air from the towboat, he at no time gave any order regarding its movement or operation, and indeed, even if he had, this could not have relieved the master or the pilot from their responsibilities to the vessel. *The B.B. No. 21* (2 Cir.), 54 F. 2d 532."

(Emphasis supplied)

This Court should grant certiorari because the Court of Appeals' decision if permitted to stand would set a precedent which this Court would not permit in the *McAllister* case.

The District Court was amply buttressed by evidence. The Court of Appeal has shown no manifest error. Lamy was Black Warrior's commanding officer on the scene. The supervision of the unloading was cast squarely on his shoulders. The acts of negligence of those under him took place under his very eyes.

Under the decision of this Court in *McAllister vs. U.S.*, the Court of Appeal should be straightened out on this issue.

(2-b)

Morrissette's negligence is final as found by the District Judge.

Likewise as to Morrissette, the same rule prevails as in (2-a) above. The District Court found:

> "The evidence shows that Lamey was not a member of the crew of the REBEL WARRIOR. He was a shoreside employee of Black Warrior, *who supervised the entire discharge operations for that Company.* Under the circumstances, the negligence of Black Warrior, as shown above, was at least partially the negligence of Lamey, for it was he who allowed the discharge operation to begin without blanking off the outboard end of the discharge line of the 109 and it was he who allowed the REBEL WARRIOR, with the open fire in her galley, to come alongside the 109 in the vicinity of the outboard end of the discharge line."
> (Emphasis supplied)

The Court of Appeal declared:

> "The trial court also found Morrissette negligent in keeping, and Lamey in allowing, a fire in the galley stove while the towboat was alongside the 109. It was sworn to at the trial that it was the custom aboard the REBEL WARRIOR to keep the galley fire going 24 hours a day. Coast Guard regulations allow this, provided that 'the senior deck officer on duty' makes an inspection 'to determine whether in his judgment galley fires may be maintained with reasonable safety.' The pilot, Kirk, testified that it was customary to douse galley fires when the towboat went alongside the barges. However, he knew that breakfast

was being prepared, and that the order, if there was such, was being violated, and admitted that he made no attempt to enforce it. Moreover, the cook cannot be charged with knowledge of the absence of the flange or of the danger that would result therefrom. Kirk brought the towboat alongside the 109, with the galley door roughly opposite the open discharge line, and although he was in his quarters reading a newspaper at the time of the explosion, he was waiting to move the towboat down-river. It is clear that it was his duty to ascertain the safety of keeping a fire in the galley while the towboat was moored to the 109, and that this matter of judgment under applicable regulations could not be tacitly delegated by him to the cook. Nor can it validly be argued that during this period the senior officer's responsibilities for safe practices aboard the towboat devolved upon the port engineer, to be resumed by the pilot only when the towboat moved away from the 109 * * *."

Again the District Court's decision is based on substantial evidence and no manifest error has been shown. Again the Court of Appeal should be straightened out.

Again, to permit the Court of Appeal's opinion to stand would do violence to this Court's decision in *McAllister vs. U. S., supra,* and would establish the dangerous precedent in appellate practices of a Court of Appeal reversing a district court in the absence of a showing of manifest error by the district court, and cause great confusion in the jurisprudence.

(3)

The Fire Statute Issue, not presented in the District Court, came too late on appeal.

The Fire Statute was invoked for the first time on appeal, for the record in the District Court is silent about it.

There is no decision by this Court that such a defense must be raised in the lower court. The question is one which should be decided by this Court because of its importance in pleading matters in the Maritime Field.

However, there are many decisions of Courts of Appeal that hold that comparable defenses if not raised in the District Court cannot be raised on appeal.

The following cases by the Courts of Appeal show the policy of the courts that related matters should not be raised for the first time on appeal, namely *Seville vs. U. S.*, 163 Fed. 2d 296 (9-C, 1947) as to the issue that appellee failed in its duty to care for the injury; *Vileski vs. Pacific-Atlantic Steamship Company*, 163 Fed. 2d 553 (9-C, 1947) with regard to sufficiency of cure; *Great Lakes Towing Company vs. American Steamship Company*, 165 Fed. 2d 368 (6-C, 1948), the issue of measure of damages for loss of use of vessel; *American Dredging Company vs. U. S.*, 174 Fed. 2d 822 (1949), an attempt to assert a cross claim for indemnification under a stevedoring contract; *Ludwig vs. Accinanto, Ltd.*, 199 Fed. 2d 134 (1952) the issue that a party was liable as an insurer; and *Nicaraguan Long Leaf Pine Lumber Co. vs. Moody*, 211 Few 2d 715 (5-C, 1954), consideration of a deposition not introduced in evidence.

We believe that the above decisions support our view that where an issue depends upon the development of facts, as in this case, and was not raised in the District Court, it can not be raised for the first time on appeal, especially where there is no sound reason shown why the defense was not urged in the District Court.

The Court of Appeal is therefore at variance with the other circuits on the principle involved, and should be straightened out.

(4)

The Fire Statute does not apply in view of Lamey's negligence.

If your Honors agree that the District Court was correct in finding Lamey guilty of negligence, then the Fire Statute by its very terms should have no application. The Court of Appeal found him "the shoreside employee solely responsible for the discharge operations".

The District Court found him responsible, R. 854. The finding is based on ample evidence.

President Davis of Black Warrior testified at some length that the unloading was under Lamey's direct control, R. 72 and 75. Therefore Lamey was chargeable with the entire operation for Black Warrior.

The conclusion reached by the Court of Appeal does violence to the decision of this Court in *Earle and Stoddard vs. Ellerman's Wilson Line (The Galileo)*, 287 U.S. 420, 53 Sup. Ct. 200 (1932), because here the immediate representative of Black Warrior, a small company, was negligent, and the company was chargeable with his actions the same as if the President himself had been in charge. The Fire Statute's very terms exclude its application. In the *Galileo, supra*, it was the Chief Engineer, a member of the vessel's personnel, who was alleged to have had knowledge, and not the personal representative of the owner. This Court should adhere to the prin-

ciple in the *Galileo* and grant certiorari.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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LEON SARPY

CERTIFICATE

This certifies that copies of this Petition have been served on Counsel for Black Warrior Towing Company, Respondent, by delivery in person on June ....., 1956.

.....

Proctor for Petitioner.

APPENDIX A

DECISION OF THE UNITED STATES CIRCUIT COURT OF APPEALS

(February 20, 1956.)

Before RIVES, TUTTLE and CAMERON, Circuit Judges.

TUTTLE, Circuit Judge: These libels, combined for trial below and for argument on appeal here, present common questions of fact and law arising out of a single incident, an explosion aboard barges of the Black Warrior Towing Company while they were discharging their cargo of gasoline at the Gulf Refining Company dock terminal near Gretna, Louisiana. The various parties raise issues concerning negligence, Section 3 of the Harter Act (46 U.S.C.A. §192), Section 1 of the Limited Liability Act (46 U.S.C.A. §182), and the effect of an exculpatory clause in the transportation contract between the two companies principally involved here.

The facts leading up to within a very few minutes of the explosion are not greatly disputed. In the early morning hours of May 11, 1952, Black Warrior's integrated oil tow, consisting of the towboat *Rebel Warrior* and the barges RTC-107, RTC-109, and RTC-112, arrived at the Gretna dock with a cargo of gasoline. The barges had been loaded at the Sidney Richardson Oil Refinery in Texas City, Texas, under the direction of the pilot, Walter Kirk. The tow was brought as far as the Harvey Locks under the command of its master, Captain Peden. When

the tow came through the locks, at approximately 2:00 A. M., Captain Taylor came aboard and relieved Captain Peden as master. Captain Taylor stayed in the pilot house of the *Rebel Warrior* until the tow reached the Gulf landing, about an hour later, when he went to bed. He was not awakened until the explosion. By that time, Captain Peden had gone ashore and the towboat, at least, was under the command of the pilot, Kirk.[1]

Kirk directed the mooring of the barges at the Gretna dock, which is on the west side of the Mississippi river, across from New Orleans. The 107 was placed at the upper end of the dock, with the 109 alongside it, and the 112 moored about 175 feet to the rear. Both the 107 and the 112 were spotted opposite 8-inch pipelines on the dock which come to within fifteen feet of the water's edge. Each of these lines is controlled by a gate valve and leads to the Gulf line which runs the length of the dock and then turns inland to the Gulf storage tanks there.

At about 4:00 o'clock, Lamey, Black Warrior's port engineer, came aboard the barge 112 to begin cargo discharge operations. He was aided by Curry, the tow's relief engineer, Dunaway, its tankerman, and Thomas and Easterling, deckhands. Gulf employees, notably LeBlanc, cooperated by readying the dock facilities to receive the gasoline.

They began with the 112. Gulf employees gauged the barge's tanks, attached a bonding wire from the dock to

[1] Kirk testified that he came off duty at 5:45, about a half hour before the explosion, and went to his quarters. However, he explained that he was waiting in his quarters for "orders" from the port engineer, Lamey, to move the towboat off, after giving air to start the barges' pumps. He testified that he was in complete charge of the towboat and barges "till the other man [Lamey] come on." It is nowhere contended, however, that Lamey, who was a shoreside employee in charge of discharge operations, had authority over the towboat superseding that of the master or pilot, even during those operations.

the vessel, and removed the plate, or flange, bolted across the face of the dock pipeline. They then checked the flanges, including the flange on the outboard end of the 112's discharge line Curry, with Thomas's help furnished compressed air from the towboat's engine room to start the barge's pump. Lamey and Dunaway primed the pump and helped Gulf employees attach a flexible rubber hose from the pipeline on the dock to the barge's discharge line, which extends across the stern of the vessel. They next opened valves leading from the barge's eight tanks into the cargo header line, which is a longitudinal pipe connecting compartments and running perpendicularly into the discharge line; and also opened two valves on the header line between the discharge line and the cargo intake line, which is parallel to and forward of the discharge line, but which plays no part in the discharge operation. Then after having started the pump engine and signalled the Gulf employees to open the dock valve, they began pumping gasoline into the Gulf line on the dock.

It was now about daybreak. The towboat, with Kirk in charge,[2] moved up to the 109 to give air to start the

[2] Kirk testified as follows:

"Q. What happened, to your knowledge, after the towboat went up alongside of 109?
A. Well, we just landed the boat there and tied it up with one line on the port quarter.
Q. What type line?
A. Well, it was just a two-inch line, a rope line—It was about a two-inch line.
Q. And—
A. We were there to give air for the pumps.
Q. What did you do then, Captain?
A. It was just about time then for me to come *off* duty." (Emphasis supplied.)

pumps on the 109 and the 107. It made fast to the 109 with a two-inch rope, the door to the towboat's galley being eight to ten feet upstream from the end of the

discharge line on the 109. By this time, all of Gulf's employees except LeBlanc had left the dock, and Lamey and Dunaway helped him fasten the rubber line from the dock to 107's discharge line. Dunaway, together with Thomas and Easterling, fastened another length of rubber hose from the discharge line of the 107 to the discharge line of the 109.

The cook, Morrissette, then called from the galley that breakfast was ready, and Thomas and Easterling went in to eat. Shortly thereafter, Curry, having finished hooking up the air hose to furnish air to the pumps on the 109 and the 107, also went into the galley to eat breakfast.

Lamey and Dunaway continued readying the barges for discharge. Moving from stern to bow on the 107, they opened valves leading from the tanks to the cargo header line, and then, with Lamey about ten feet in the lead, crossed over to the bow of the 109. Going from bow towards the stern on the 109, they continued to open the corresponding valves on that barge. At this point, Thomas and Easterling, and then Curry, finished eating and stepped back out on the barge. According to Thomas's and Curry's testimony, they saw gasoline running from the open end of the discharge line on the 109 in a stream filling about a third of the eight-inch opening of the pipe, and spilling out on the deck of the 109. Thomas testified that he shouted to a man on the dock to turn off the dock valve, and that the man began to do so. In a moment, however, there was a flash across the stern of the 109, and then an explosion. Thomas was thrown alongside Dunaway on the barge and Curry was also knocked down. Thomas and Dunaway ran up on the dock to the levee runway, where Dunaway saw LeBlanc. Curry went up on the dock, where—he testified—he saw LeBlanc closing the

dock valve; then, stopped by flames from following Dunaway and Thomas, he ran to the end of the dock and jumped into the river, from whence he was rescued. The bodies of Morrissette and Easterling were found several days later. Lamey's body has never been recovered, and he is presumed dead.

The trial court found that the explosion was touched off by gasoline fumes arising from the spillage on the barge's deck and ignited by the fire in the galley stove. This gasoline, it found, came originally from the 112, passed down the Gulf line and escaped through the partially opened dock valve into the discharge line of the 107 and the 109, and thence out the open end of that line. It found that LeBlanc opened the valve prematurely, without having received the customary signal from the workers on the barge that they were ready to begin discharging, and that this negligence contributed 50% to the accident; that Black Warrior's employees were negligent in commencing the discharge operation without the blind flange on the outboard end of the line, and that Curry and Thomas were negligent in this respect and each contributed 5% to the accident; that Lamey was negligent in allowing the discharge operations to begin without checking the outboard end of the discharge line to be sure it was closed by a flange; and that Morrissette was negligent in keeping, and Lamey in allowing, an open burner in the galley stove while discharge operations were going on.

LeBlanc and the Gulf Refining Company attack these findings on the ground that there is no evidence to support the finding that LeBlanc opened the dock valve, and in the alternative, that if he did, this was not a proximate cause of the accident. The evidence clearly supports the trial court's finding in both respects. No gasoline was

seen coming from the end of the discharge line until Curry and Thomas came out of the galley of the *Rebel Warrior*. All of Gulf's employees had by that time left the dock, except LeBlanc, and he was later seen by these same witnesses, according to their testimony, in the act of closing the valve. In addition, a Coast Guard Board of Investigation after the accident found a quantity of gasoline in the dock line outside of the valve, tending to negate the contention of Gulf and LeBlanc, because of the physical arrangement of the barge's and dock facilities, that the gasoline causing the explosion came from the 109 or the 107.

Regarding causation, Gulf and LeBlanc argue that in view of the gross negligence of Balck Warrior in permitting a fire in the galley during discharge operations and in leaving the outboard end of the discharge line unflanged, LeBlanc's negligence was *de minimis*. The trial court found LeBlanc's negligence to be a 50% factor in causing the accident and we cannot set aside this finding of fact unless it was clearly erroneous. *Consumers Import Co. v. Kawasaki Kisen Kabushiki Kaisha* (2 Cir.), 133 F. 2d 781, aff'd 320 U.S. 249, 64 S. Ct. 15, 88 L. Ed. 30. The evidence, quite contrary to this contention of Gulf and LeBlanc, is that LeBlanc's negligence was not *de minimis*. All who testified regarding discharging procedures, including Gulf's witnesses Yockman, the assistant superintendent of its Gretna terminal, and Hepting, its dock foreman, stated that it was the invariable custom in discharging to await a signal from the barges before opening a dock valve. Moreover, it cannot be argued, as Gulf and LeBlanc urge, that his action is excusable because he was not required to foresee that the other end of the discharge line would be open. The general rule is that one may still be found negligent despite

the fact that the particular consequences of his negligence are not foreseeable. Restatement, Torts, §435. Thus, here, if LeBlanc could not be required to know of the missing flange, he was at least chargeable with the knowledge that releasing gasoline down lines not normally used in receiving it, and in any event not even prepared to discharge it, was an act likely to bring dire results.

Gulf and LeBlanc argue also that under the *sine qua non* or "but-for" test of causation, LeBlanc's act cannot be regarded as the proximate cause of the explosion. They reason that if LeBlanc had waited for the proper signal before opening the valve, gasoline would still have spilled out the open end of the discharge line. This argument must be rejected on the evidentiary ground, as we consider the trial court to have rejected it, that this result would not have occurred, in the light of Dunaway's testimony that he and Lamey inspected the flanges on the 112 before giving LeBlanc the signal to open the gate valve there, and would have done the same on the 109 had LeBlanc allowed them the opportunity.

Black Warrior, meeting the issue of negligence head on, denies that it was negligent and contends that it breached no duty of care owed to Gulf by the leaving off of the flange from the outboard end of the discharge line or even from the placing of the *Rebel Warrior* with an open galley fire in such close juxta-position to the open end during the preliminary stages of preparation for actual discharge operations. This argument is similar to that of Gulf, to the effect that these two circumstances of open ended discharge line (unquestionably an abnormal condition) and an open galley fire close by (the unquestioned activating cause of the explosion) were still wholly innocuous and would have remained so *but for* the pre-

mature opening of the gate valve on the dock by LeBlanc.

Whether we view the relevance of these critical facts from the viewpoint of negligence or causation we are convinced that the existence of these conditions under all the circumstances of an actual unloading operation are such as would permit the inference by the fact finder that they were both negligence and a proximate cause of the explosion. We cannot, therefore, hold that such finding by the trial court was clearly erroneous. Neither can we challenge the court's assessment of fault as being equal between Gulf and Black Warrior.

Agreeing, then, with the findings of fact of the trial court regarding the circumstances of the explosion and the assessment of fault equally between Gulf's employee and Black Warrior's employees,[3] we may proceed to consider the separate libels filed in the court below.

The Personal Injury and Wrongful Death Libels.

The representative of Morrissette, and the Hartford Accident & Indemnity Co., subrogee of the rights of Lamey's representatives, filed libels against Gulf and LeBlanc for the wrongful deaths of these men. The district court, in applying the Louisiana death statute, held that claims brought under that act in admiralty were subject to all defenses against such claims, including contributory negligence, available to a defendant in a suit at law. This is, of course, the general rule. See *Graham v. A. Lusi, Ltd.* (5 Cir.), 206 F. 2d 223, and cases cited therein.

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[3] The trial court found: "[The] explosion * * * would not have occurred but for the premature opening of the gate valve by Gulf on one hand and the failure of Black Warrior to blank off the outboard discharge line of the 109 on the other. These concurring acts of negligence, equally effective, were the direct and proximate causes of the damage in suit."

We may inquire, however, in what respects Morrissette and Lamey were guilty of the negligence attributed by the trial court to Black Warrior's employees. There can be no doubt that the discharge line on the 109 was unflanged for some time prior to the morning of May 11, and probably at least since the barges had been loaded at Texas City.[4] The trial court characterized the beginning of discharge operations without the flange in place as "the grossest kind of negligence".[5]

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[4] Kirk testified that he never checked the flanges on the end of the discharge lines at Texas City, but only the cargo intake lines which were used in loading the barges. He stated:

"A. No, I didn't check back of the pumps because it was—

Q. But you didn't check, or you didn't determine whether or not it was blanked off with proper flanges?

A. No, I didn't have to use it at all, and I didn't brother with it.

Q. You never thought about it?

A. I never bothered with it, because I didn't have to use it.

* * * * *

Q. And after you finished discharging, do you put the blank flanges back on?

A. Well, sometimes I would and sometimes I wouldn't.

Q. You mean you would leave them open?

A. You would have a valve there that would cut the whole line—

Q. Regardless of any valve, you mean you would leave the end of the line unflanged at any time?

A. You can do it, yes. You have a valve to cut it off— the main valve to cut that off."

[5] The testimony of an oil chemist at the trial was as follows:

"Q. You have heard testimony that even under the most ideal conditions there would be vapor in the header due to normal loading procedures, isn't that correct?

A. It is. It is impossible to avoid having vapors in the header.

* * * * *

Q. Now, Mr. Shilstone, are you familiar with the blank flanges on the ends of the discharge line such as you saw in those diagrams?

A. Yes, I am.

Q. If you have a blank flange which is properly affixed with some sealing property, such as a gasket, is that satisfactory to shut off gas fumes and to prevent their escape?

(Continued)

Such a condition would warrant an additional finding by the trial court that the 109 was unseaworthy, for with the discharge line open, a spark could have at any time ignited the gasoline vapors always present therein. The fact that the barge's owners had provided sufficient flanges to blank off the open ends of all cargo lines did not render the vessel any the less unseaworthy. *International Navigation Co. v. Farr & Bailey Mfg. Co.*, 181 U.S. 218, 21 S. Ct. 591, 45 L. Ed. 830. The ultimate responsibility for making sure that all cargo lines were flanged, before the tow left Texas City, lay with the tow's master or with its pilot, who supervised the loading operation there.[6]

The trial court found, however, that Lamey also was negligent, "for it was he who allowed the discharge operation to begin without blanking off the outboard end of the 109." On the other hand, as noted above, Dunaway's uncontradicted testimony was that he and Lamey checked the flanges on the 112 before beginning the discharge operation there, and were preparing to do the same on the

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[5] (Continued)

A. Yes, sir. The gasket is termed, in effect, a seal, and it is accepted as satisfactory and has proven itself in practice to be so.

* * * * *

Q. —do you consider it in your experience of having handled all these barges over the period of years, safe or unsafe practice to leave the blank flange off the end thereof?

A. I would not provide a vessel a gas-free certificate, nor would I be authorized to by the American Bureau of Shipping, where a line is allowed to be open, such as that."

[6] Kirk testified:

"Q. Now, in departing from Texas City, whose job was that to see that all lines were properly blanked off?

A. Well, whoever the loader was. I was the loader of that one.

Q. You were the loader?

A. Yes."

107 and the 109 when the explosion occurred.[7] There was no evidence that Lamey knew of the absence of the flange, but there is evidence that he would have checked it before starting the pumps or authorizing LeBlanc to open the dock valve. The trial court thus imposed a duty on Lamey to make a complete inspection of the barges, for unseaworthiness, immediately on coming aboard to conduct discharge operations. We cannot agree that it was a breach of due care on Lamey's part to postpone his inspection of the equipment he was to use until immediately before he was prepared to use it. He could not reasonably be required to foresee, in other words, that from the moment he came aboard the barges in the morning, a condition existed, and had existed before their arrival, which im-

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[7] Dunaway testified, regarding the 112:

"A. * * * Then we checked the flanges—

Q. When you say 'we'—

A. **Mr. Lamey and I.**

Q. You and Mr. Lamey?

A. Yes, we work right together until we get everything going. We checked the flanges and then we opened up the valve and we asked the dock man was he ready to go, and told him that we were ready when he was and he told us to go ahead and start pumping."

Regarding the 109:

"Q. What happened after you opened those four valves?

A. We walked on back towards the engine, going back to check for the flanges and all of that.

Q. When you say 'check for the flanges,' who do you mean?

A. We were going to check your discharge line, and also the intake line for flanges, all of them.

Q. Up to this time, had you done any checking or preparations on the stern of 109?

A. No, I hadn't.

Q. Other than crossing over the barges, had you been on the stern of 109 up to this time?

A. Not behind the engine, not as I recall.

Q. So. you were walking back to check your flanges, and what did you do then?

A. Well, checked the two valves by the pump, and after we see if it is—

Q. I mean, what did you actually do this particular morning? What happened?

A. We were coming on back that far, and then a flash ran over on us—in other words, the fire, and blazed up right on us."

periled the lives of the entire crew. The fault for leaving the discharge line unflanged lay, as we have said, with the master or the pilot; and in the light of the usual warranty of a vessel's seaworthiness at the beginning of a voyage, *The Caledonia*, 157 U.S. 124, 15 S. Ct. 502, 39 L. Ed. 613, we see no reason why Lamey should have presumed the fact to be otherwise.

The trial court also found Morrissette negligent in keeping, and Lamey in allowing, a fire in the galley stove while the towboat was alongside the 109. It was sworn to at the trial that it was the custom aboard the *Rebel Warrior* to keep the galley fire going 24 hours a day. Coast Guard regulations allow this, provided that "the senior deck officer on duty" makes an inspection "to determine whether in his judgment galley fires may be maintained with reasonable safety."[8] The pilot, Kirk, testified that it was customary to douse galley fires when the towboat went alongside the barges. However, he knew that breakfast was being prepared, and that the order, if there was such, was being violated, and admitted that he made no

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[8] 46 C.F.R. 35.30-5

"(c) Galley Fires. Galley fires are normally permitted during cargo transfer operations: *Provided*, That prior to loading Grades A, B and C cargoes the senior deck officer on duty, who shall be a licensed officer or certificated tankerman, shall make an inspection to determine whether in his judgment galley fires may be maintained with reasonable safety during the loading operation."

Although the phrase "during the loading operation" might seem to limit the application of this regulation to loading, as contrasted to both loading and discharge operations, Lieutenant Commander Pearce of the Coast Guard, when asked about the galley fire here, testified: "The regulation in question is 35.30-5—The answer would be that certain officers in charge may make certain examinations to ascertain that conditions are safe for the handling, and that is 35.35-20 of Subchapter D."

This provides that "Prior to the transfer of cargo, the senior deck officer on duty, who shall be a licensed officer or certificated tankerman, shall inspect the vessel to assure himself that the following conditions exist:

(i) In loading Grades A, B, and C cargoes, that an inspection has been made to determine whether galley fires can be maintained with reasonable safety."

attempt to enforce it. Moreover, the cook cannot be charged with knowledge of the absence of the flange or of the danger that would result therefrom. Kirk brought the towboat alongside the 109, with the galley door roughly opposite the open discharge line, and although he was in his quarters reading a newspaper at the time of the explosion, he was waiting to move the towboat downriver. It is clear that it was his duty to ascertain the safety of keeping a fire in the galley while the towboat was moored to the 109, and that this matter of judgment under applicable regulations could not be tacitly delegated by him to the cook. Nor can it validly be argued that during this period the senior officer's responsibilities for safe practices aboard the towboat devolved upon the port engineer, to be resumed by the pilot only when the towboat moved away from the 109. The port engineer was the shoreside employee solely responsible for the discharge operations, but although those operations required air from the towboat, he at no time gave any order regarding its movement or operation, and indeed, even if he had, this could not have relieved the master or the pilot from their responsibilities to the vessel. *The B.B. No. 21* (2 Cir.), 54 F. 2d 532.

In the libels for personal injuries brought by Curry and Thomas against Gulf and LeBlanc, the trial court found that the negligence of each of these libelants contributed 5% to the accident, and thereby diminished their rights of recovery to this extent. We cannot regard this finding as clearly erroneous. Although Thomas was only a deckhand, and Curry the relief engineer aboard the tow, both of them came with the tow from Texas City, and were aware, or should have been aware, of the fact that the discharge line on the 109 was open, and therefore likely to cause an explosion. The finding that LeBlanc's

negligence was a 50% factor in the explosion is likewise affirmed.

Gulf has filed, in each of the personal injury and wrongful death libels, a petition under Admiralty Rule 56 to implead Black Warrior, on the ground that Black Warrior's negligence was the sole cause of the accident. The finding of the trial court, which we affirm, that Black Warrior and Gulf were equally negligent, forecloses any right on the part of Gulf to indemnity. Moreover, Gulf has no right to *contribution* from Black Warrior, its joint tortfeasor in a non-collision maritime injury case. *Halcyon Lines v. Haenn Ship Corp.*, 342 U.S. 282, 72 S. Ct. 277, 96 L. Ed. 318.

Black Warrior's Claim of Exculpation for Cargo Damage.

Black Warrior here urges three grounds for denying Gulf's claim for recovery for the cargo destroyed in the explosion and resulting fire. The first is the release clause in the transportation contract between the two companies, which also incorporates Section 3 of the Harter Act (46 U.S.C.A. §192). Regarding this defense, it is important only to note that exemption both under the clause in question and under the Act[9] is predicated on the

[9] The clause reads:

"Release: The cargo shall be transported at the sole risk of such cargo, in so far as loss or damage to such cargo is concerned, and neither Owner nor any person employed by Owner, nor any vessel, barge or other equipment used hereunder, shall be liable for any loss of or damage to such cargo regardless of the causes of such loss or damage, provided only that Owner shall have exercised due diligence to make such vessel and other equipment seaworthy and properly manned, equipped and supplied, and provided that reasonable care shall have been exercised in the receipt, stowage, handling, care and delivery of the cargo which shall be in the possession of the tow from the time that the petroleum products reach the barge pipe in loading until the products reach the shore line hose connection in unloading. Owner shall be entitled to the exoneration from liability under Sec-

(Continued)

owner's exercising "due diligence" in making the vessel seaworthy. The Act has been interpreted to require, for exemption, not only that the owner furnish all proper equipment for the vessel, but also that his servants exercise due care in using such equipment before the commencement of the voyage. *International Navigation Co. v. Farr & Bailey Mfg. Co., supra.* This same qualification for release must apply in the case of the contractual limitation of liability, since it uses language substantially similar to that of the statute.

Black Warrior also relies on the "Force Majeure" clause in the contract, set out in a footnote below.[10] This

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[9] (Continued)
tion 3 of the Harter Act (46 U.S.C.A. 192). Nothing in this contract shall be construed to deprive Owner of, or to limit Owner's rights to, any statutory protection or limitation of liability, which would otherwise by [sic] applicable."

The Harter Act provides:

"§192. *Limitation of liability for errors of navigation dangers of the sea and acts of God.* If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damages or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

[10] "Force Majeure: Neither Owner, Charterer, the tow, her master or owners, nor any other equipment used by Owner, shall be responsible or liable in any way for any loss or damage, or for any failure or delay in performance hereunder arising or resulting from: Acts of God, Perils of the waters, or of navigation, strikes or stoppage of labor for whatever cause, fire, explosion, neglect, default or barratry of the master or crew, enemies, pirates, assailing thieves, seizures, arrest or restraint of princes, rulers or people riots or civil commotion, compliance with any law, rule, order, regulation, restriction, recommendation or request of any government or agency thereof or any person purporting to act under authority thereof or any other cause, whether similar or dissimilar to the foregoing, which is beyond their control."

clause exculpates the owner from liability for damages resulting from a number of causes, which might or might not stem from the negligence of the owner or his servants, but closes with the words "or any other cause, whether similar or dissimilar to the foregoing, which is beyond their control." The trial court characterized the clause as "but a mishmash of words," and, while it is our duty to construe it to the best of our ability, it is plain that in order to give it meaning, we must regard the words "beyond their control" as indicating an exculpation only when "fire, explosion" and other listed causes occur by the acts of nature or of third parties. Such was not the case. It is, therefore, not applicable.

Black Warrior's final defense on Gulf's claim for damage to cargo is based on Section 1 of the Limited Liability Act (46 U.S.C.A. §182), the so-called fire statute.[11] This grants a vessel-owner exemption from liability for damage to cargo caused by fire, "unless such fire is caused by the design or neglect of such owner." It is settled law that unseaworthiness in itself does not constitute such neglect, and moreover, that to deny exemption the negligence must be that of the owner himself or his managing officers. Thus, while under the Harter Act, the negligence of a ship's employee is imputable to the vessel owner, under the fire statute it is not. *Earle & Stoddart v. Wilson Line*, 287 U.S. 420, 53 S. Ct. 200, 77 L. Ed. 403; *Consumers Import Co., Inc. v. Kawasaki Kisen Kabushiki Kaisha, supra.*

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[11] This provides:

"182. Loss by fire. No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner."

Gulf argues first, that Lamey's negligence is imputable to Black Warrior—now an irrelevant contention in the light of our reversing the finding of negligence on Lamey's part—and, second, that the defense cannot be considered here because it was not urged below. It is quite true that this is the general rule. *Benton v. Blair* (5 Cir.), ... F.2d ..... Nevertheless, we are not bound by it as an absolute principal, and since the case must be remanded to the district court for the ascertainment of damages, we may here hold the defense available to Black Warrior, reserving to the parties the right to introduce further evidence below regarding the applicability of the fire statute in this case. Cf. *The I.S.E. 2* (9 Cir.), 15 F. 2d 749.

The following disposition is therefore made of these appeals:

No. 15,593—Reversed and Remanded.
No. 15,594—Affirmed.
No. 15,595—Reversed and remanded, with directions to allow the introduction of evidence by either party, or both, regarding the exemption of liability provided by 46 U.S. C.A. §182.
No. 15,596—Affirmed.
No. 15,597—Affirmed.
No. 15,598—Reversed and Remanded.

CAMERON, Circuit Judge, Concurring in part and dissenting in part:

I agree with the conclusions reached by the majority and set forth in the able opinion except those resting upon the premise that the Black Warrior was guilty of action-

able negligence in leaving the outboard end of the discharge line open during the activities incident to making the pipelines of barge 109 ready for the beginning of unloading operations. Those preparatory steps were to be completed entirely before the barge's pumps were set in operation and before the signal was given to LeBlanc that the valve should be opened so that Gulf's pipe line might receive the gasoline propelled to it by the barge's pumps.

But those preparatory steps had not been completed, the signal had not been given to start the barge's pumps and the signal had not been given to LeBlanc that discharge of the cargo was ready to begin. Until those signals were given and the pumps were started and LeBlanc's valves were opened, no danger could arise from the open-ended pipe. It was proper and without hazard, under the evidence, that either or both ends of this discharge line be left open until the beginning of discharge operations. Indeed, it is logical that they should be left open until it had been decided which side of the barge should be placed next to the shore; and also, to the end that the air in the pipeline might have a means of escape during the other preparatory steps.

The situation of the Rebel Warrior with the fire in the galley, of the two barges being prepared for cargo discharge and with respect to all other relevant factors had existed for more than twenty minutes without incident. It was only the introduction of large quantities of gasoline into the discharge line of the 109 which caused the explosion or created any hazard at all. The crew of the *Rebel Warrior* had a right to perform their duties, assured that Gulf would not turn down upon them a column of gasoline until the signal was given. In fact, it is evident that Gulf's employees were keenly aware of the

danger connected with opening the valve of its pipeline; for, as shown by the majority opinion, they were not content to place complete reliance in the *Rebel Warrior's* crew, but, themselves, checked the flange on the outboard end[1] of the 112's discharge line before essaying to connect up the flexible rubber hose between Gulf's pipeline and the discharge line of the 112.

It is clear to me that the open end of this discharge line was a perfectly proper and harmless condition, which could be made dangerous only by a wanton and unforeseeable act by Gulf's valve man. Without dispute, it would have been closed before the pumps were started or the signal given to Gulf to open the valve. The election by the *Rebel Warrior's* crew to defer closing the open pipe until after other steps had been taken in preparing for the beginning of the discharge operation, was not a negligent act and was not a proximate cause of the explosion. In my opinion, the Court below committed an error of law in judging this to be negligence. I dissent, therefore, from the portions of the majority opinion resting upon the affirmance of this part of the finding and judgment of the Court below.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Fifth Circuit.

[1] Here is what the majority opinion states: "They began with the 112. Gulf employees gauged the barge's tanks, attached a bonding wire from the dock to the vessel, and removed the plate or flange, bolted across the face of the dock pipeline. *They then checked the flanges, including the flange on the outboard* end of the 112's discharge line." [Emphasis added.]

APPENDIX B

BLACK WARRIOR

TOWING COMPANY

Houston, Texas
February 18th, 1952

RECEIVED
MARINE DEPT.
FEB 20 1952

Gulf Refining Company
Gulf Building
Pittsburgh, Pennsylvania

Gentlemen:

BLACK WARRIOR TOWING CO., INC., owner or chartered owner of the equipment hereinafter described, (hereinafter called "Owner") hereby charters and GULF REFINING COMPANY (hereinafter called "Charterer"), hereby hires, a tow for the transportation of certain liquid petroleum products in bulk upon the following terms and conditions:-

1. EQUIPMENT: A tow comprised of one 700 h.p. towboat and three 9000 barrel tank barges, total capacity of tow 27,000 barrels.

2. LOADING POINT: Port Arthur, Texas

3. DESTINATION: Various; see Item 13, "SPECIAL PROVISIONS", (c) and (d)

4. CARGO: Clean petroleum products.

5. APPROXIMATE LOADING DATE: On or about February 18th, 1952.

6. PERIOD: Consecutive voyages for one year from date of initial loading.

7. FREIGHT RATE: Various; see "SPECIAL PROVISIONS", (d)

8. LAYTIME: Three running hours freetime at loading port.
Three running hours freetime at discharging port.
LOADING RATE: Two thousand (2000) barrels per hour.
DISCHARGING RATE: Fifteen hundred (1500) barrels per hour.

9. DEMURRAGE RATE: Twenty ($20.00) dollars per hour

10. PREVIOUS CARGO: Clean petroleum products

11. PUMPING: By and for account of Owner.

(continued on page 2)

BLACK WARRIOR

TOWING COMPANY

12. INSURANCE: Cargo insurance, if and, shall be procured by Charterer for account of and at the expense of Charterer. If insured, Charterer's underwriters shall extend waiver of subrogation to Owner.

13. SPECIAL PROVISIONS: (a) Barges tendered will last have contained clean petroleum products; and additional cleaning, if required or for change of cargo, will be for the account of Charterer and time so used will be counted as used laytime.

(b) Charterer may "split load" individual barges with more than one grade of product, Owner to be held harmless in event of admixture or contamination of grades, howsoever occuring.

(c) Charterer has optionto consign tow to other destinations on Gulf Intracoastal Waterway (no further East than Mobile) and Mississippi River, subject to Previous arrangement with Owner.

(d) Freight rates:-

(1) Port Arthur, Texas to Mobile, Alabama:- Twenty-one (21¢) per forty-two gallon barrel.

(2) Port Arthur, Texas to Baton Rouge, Louisiana:- Nineteen and one-half (19-1/2¢) cents per forth-two gallon barrel.

(3) Port Arthur, Texas to Vicksburg, Mississippi:- Two dollars, fourteen cents ($2.14) per net ton of 2000 pounds.

Port Arthur to Greenville, Mississippi:- Two dollars, fifty-four cents ($2.54) per net ton of 2000 pounds.

On tow loaded for more than one discharge destination, tow will earn freight rate on total cargo loaded to most distant port of discharge.

14. LAYTIME, LOADING AND DISCHARGING RATES, ETC.: Charterer shall furnish tow with safe loading berth and safe discharging berth promptly on arrival.

(continued on page 3)

BLACK WARRIOR

TOWING COMPANY

14. LAYTIME, LOADING AND DISCHARGING RATES, ETC.: Charterer is allowed the number of hours free time at loading port as stated in Item 8, after which loading is to be accomplished at the minimum rate of the number of barrels as stated therein, per running hour, berth or no berth, day or night, Saturdays, Sundays and holidays not excepted. Charterer is allowed the number of hours free time at discharging port as stated in Item 8, after which discharging is to be accomplished at the minimum rate of the number of barrels as stated therein, per running hour, berth or no berth, day or night, Saturdays, Sundays and holidays not excepted.

15. DEMURRAGE: In the event loading and/or discharging is not accomplished at the minimum rates named through no fault of the Owner or Owner's equipment, demurrage shall accrue, and Charterer shall pay owner at the rate per hour or fraction thereof for tow, as stated in Item 9.

16. GENERAL AVERAGE: In the event of accident, danger, damage or disaster before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, Owner is not responsible to Charterer by statute or contract or otherwise, Charterer and other parties having an interest in the cargo shall contribute in general average to the paymentof any sacrifices, losses or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the cargo. General average, if any, shall be settled according to York-Antwerp Rules, 1924, 1 to 15 and 17 to 22, both inclusive, and as to matters not therein provided for, according to the usages and customs of the Port of New York.

17. FREIGHT PAYMENT: Charterer will furnish Owner, free of cost, copies of loading certificates. Freight shall be paid on intake quantity, barge guages, in net cash upon presentation of documents. Freight shall be earned, cargo lost or

(continued on page 4)

BLACK WARRIOR

TOWING COMPANY

GULF REFINING COMPANY/BLACK WARRIOR TOWING COMPANY TUG AND BARGE CHARTER - FEBRUARY 15TH, 1952.

(page 4)

17. FREIGHT PAYMENT: (continued) not lost. All charges for pumping, cleaning, demurrage, if any, shall be payable upon receipt by Charterer of Owner's invoice therefor.

18: WHARFAGE AND DOCKAGE: Charterer, warrants that the Owner's equipment shall be free of wharfage and dockage charges at loading and discharging ports.

19: FORCE MAJEURE: Neither Owner, Charterer, the tow, her master or owners, nor any other equipment used by Owner, shall be responsible or liable in any way for any loss or damage, or for any failure or delay in performance hereunder arising or resulting from: Acts of God, Perils of the waters, or of navigation, strikes or stoppage of labor for whatever cause, fire, explosion, neglect, default or barratry of the master or crew, enemies, pirates, assailing thieves, seizures, arrest or restraint of princes, rulers or people riots or civil commotion, compliance with any law, rule, order, regulation, restriction, recommendation or request of any government or agency thereof or any person purporting to act under authority thereof, or any other cause, whether similar or dissimilar to the foregoing, which is beyond their control.

20. RELEASE: The cargo shall be transported at the sole risk of such cargo, in so far as loss or damage to such cargo is concerned, and neither Owner nor any person employed by Owner, nor any vessel, barge or other equipment used hereunder, shall be liable for any loss of or damage to such cargo regardless of the causes of such loss or damage, provided only that Owner shall have exercised due diligence to make such vessel and other equipment seaworthy and properly manned, equipped and supplied, and provided that reasonable care shall have been exercised in the receipt, stowage, handling, care and delivery of the cargo which shall be in the possession of the tow from the time that the petroleum products reach the barge pipe in loading until the products reach the shore line hose connection in unloading. Owner shall be entitled to the exoneration from liability under Section 3 of the Harter Act (46 USCA 192). Nothing in this

(continued on page 5)

BLACK WARRIOR

TOWING COMPANY

GULF REFINING COMPANY/BLACK WARRIOR TOWING COMPANY TUG AND BARGE CHARTER - FEBRUARY 15TH, 1952.

(page 5)

20. RELEASE: (continued) contract shall be construed to deprive Owner of, or to limit Owner's rights to, any statutory protection or limitation of liability, which would otherwise by applicable.

21. INDEMNITY: If the tow comes into collision with another vessel as a result of the negligence of the other vessel and any act, neglect or default of Owner or the master or crew of the tow, for which, or for the consequence of which, Owner is not responsible to Charterer by statute or contract or otherwise, Charterer and the other parties having an interest in the cargo shall, jointly and severally, hold harmless and indemnify Owner against all liability to the other vessel or her owners or the owners of the cargo of the other vessel with respect to any payment which Charterer or such other parties have received or may be entitled to receive from the other vessel or her owners, or the owners of the cargo of the other vessel.

22. VAPOR PRESSURE: No petroleum product shall be transported hereunder with a vapor pressure exceeding 14 pounds at 100 degrees Fahrenheit as determined by the Reid Method.

23. DEFINITIONS: Wherever the word, "Barrel" appears herein it means a barrel of 42 U.S.A. measured gallons at 60° F.

BLACK WARRIOR TOWING CO., INC.

By: Howard Davis
President

ACCEPTED THE 7th DAY OF March, 1952

GULF REFINING COMPANY

By: J. A. Hurley
Marine Traffic Manager

APPENDIX C

U.S. FIRE STATUTE, 46 U.S. CODE 182.

Sec. 182. LOSS BY FIRE. No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner. (R.S. Sec. 4282).

APPENDIX D

ART. 2315 LOUISIANA CIVIL CODE. LIABILITY FOR ACTS CAUSING DAMAGE; SURVIVAL OF ACTION.

Art. 2315. Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it; the right of this action shall survive in case of death in favor of the children, including adopted children and children given in adoption, or spouse of the deceased, or either of them, and in default of these in favor of the surviving father and mother or either of them, and in default of any of the above persons, then in favor of the surviving blood brothers and sisters, or either of them, for the space of one year from the death. However, should the deceased leave a surviving spouse, together with minor children, the right of action shall accrue to both the surviving spouse and the minor children. The right of action shall accrue to the major children only in those cases where there is no surviving spouse or minor child or children.

If the above right of action exists in favor of an adopted person, it shall survive in case of death in favor of the children or spouse of the deceased, or either of them, and in default of these in favor of the surviving adoptive parents, or either of them, for the space of one year from the death. However, this right of action shall survive in favor of the blood parent or parents to the exclusion of the adoptive parent or parents when at the time of the adoption the adopted was a major, or emancipated minor whose adoption was effected without the consent of the blood parent or parents evidenced in the

act of adoption. In default of these, it shall survive in favor of the surviving blood brothers and sisters of the adopted person, or either of them, for the space of one year from the death.

The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child or husband or wife or brothers or sisters or adoptive parent, or parents, or adopted persons, as the case may be. (As amended by Acts 1948, No. 333, Sec. 1).

APPENDIX E

LIST OF CASES IN RECORD AND JUDGMENTS

In the first libel, Hartford Accident & Indemnity Company vs. Gulf Refining Company and Villa LeBlanc, No. 15,593 on appeal (District Court No. 2262), the Longshoremen's and Harbor Workers Compensation Act insurer for Black Warrior sued for reimbursement of compensation paid to William L. Lamey's survivors. In the other death case, No. 15,598 (District Court No. 2330) by the survivors of the cook Nolan Morrissette, the Court of Appeal reversed and remanded the District Court's dismissal of these suits on the ground of contributory negligence under the State law of Louisiana, Civil Code Article 2315.

In No 15,595 (District Court No. 2313) Gulf sued Black Warrior for property damage to its terminal, and gasoline cargo, and Black Warrior cross libeled for property damages to its tug and barges. The District Court decreed divided damages. The Court of Appeal reversed and remanded with directions to allow evidence regarding the exemption under the Fire Statute.

In No. 15,596 and 15,597 (District Court No. 2328 and 2339 respectively) Black Warrior's employees Curry and Thomas sued Gulf and LeBlanc for personal injury damages. Gulf and LeBlanc impleaded Black Warrior under the 56th Admiralty Rule. The District Court dismissed both impleading petitions but allowed recovery to libelant on an apportioned basis in view of contributory negligence. The Court of Appeal affirmed.

The suit by LeBlanc against Black Warrior (Court of Appeal No. 15,594, District Court No. 2312) is not included in this application.

JUDGMENT.

Extract fron the Minutes of February 20th., 1956.

No. 15593.

HARTFORD ACCIDENT & INDEMNITY COMPANY,

versus

GULF REFINING COMPANY and VILLA LeBLANC.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the Decree of the said District Court in this cause be, and the same is hereby, reversed and that this cause be, and it is hereby, remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered, adjudged and decreed that the appellees, Gulf Refining Company and Villa LeBlanc, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

JUDGMENT.

Extract from the Minutes of February 20, 1956.

No. 15595.

GULF REFINING COMPANY,

versus

BLACK WARRIOR TOWING COMPANY,

BLACK WARRIOR TOWING COMPANY,

versus

GULF REFINING COMPANY.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions to allow the introduction of evidence by either party, or both, regarding the exemption of liability provided by 46 U.S.C.A. §182;

It is further ordered, adjudged and decreed that the appellant and appellee, Gulf Refining Company, and the surety on its appeal bond herein, Federal Insurance Company, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Cameron, Circuit Judge, dissenting."

JUDGMENT.

Extract from the Minutes of February 20, 1956.

No. 15596.

GULF REFINING COMPANY,

versus

GEORGE L. CURRY,

GEORGE L. CURRY,

versus

GULF REFINING COMPANY and VILLA LeBLANC.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellant and appellee, Gulf Refining Company, and the surety on its appeal bond herein, Federal Insurance Company, be condemned, in solido, to pay the cost of this cause in this Court for which execution may be issued out of the said District Court.

"Cameron, Circuit Judge, dissenting."

JUDGMENT.

Extract from the Minutes of February 20, 1956.

No. 15597.

GULF REFINING COMPANY,

versus

JOHN THOMAS,

JOHN THOMAS,

versus

GULF REFINING COMPANY and VILLA LeBLANC.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellant and appellee, Gulf Refining Company, and the surety on its appeal bond herein, Federal Insurance Company, be condemned, in solido, to pay the cost of this cause in this Court for which execution may be issued out of the said District Court.

"Cameron, Circuit Judge, dissenting."

JUDGMENT.

Extract from the Minutes of February 20th., 1956.

No. 15598.

MARTHA JANE MORRISETTE,

versus

GULF REFINING COMPANY and VILLA LeBLANC.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the Decree of the said District Court in this cause be, and the same is hereby, reversed and that this cause be, and it is hereby, remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered, adjudged and decreed that the appellees, Gulf Refining Company and Villa LeBlanc, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

JUL 11 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 173

GULF REFINING COMPANY,
Petitioner,

versus

BLACK WARRIOR TOWING COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

SELIM B. LEMLE,
Proctor for Respondent,
1836 National Bank of
Commerce Building,
New Orleans 12, Louisiana.

Of Counsel:
LEMLE & KELLEHER,
GEORGE B. MATTHEWS.

HAUSER PRINTING CO., INC., NEW ORLEANS

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

SUMMARY OF STATEMENT

Petitioner's "Summary of Statement" while quite lengthy, is incomplete, garbled and wholly inaccurate. Being dissatisfied therewith, we restate here summarily the facts, and the litigation and how it has been resolved by the District Court and by the United States Court of Appeals for the Fifth Circuit.

While a cargo of petroleum carried in a tow of barges owned and operated by respondent Black Warrior Towing Company, (hereinafter referred to as Black Warrior),

was being discharged at the wharf of petitioner, Gulf Refining Company (hereinafter referred to as Gulf) at New Orleans, an explosion occurred, followed by a fire, as a result of which both petitioner and respondent suffered property damage and there occurred loss of life and personal injury. As a result of this explosion and fire a series of suits were filed in admiralty in the United States District Court for the Eastern District of Louisiana.

The principal issues common to all of these suits was the negligence *vel non* of Gulf Refining Company and Black Warrior Towing Company. On conflicting testimony, all taken in open court, the District Judge, who heard the witnesses and observed their demeanor on the stand, concluded that the explosion and resulting fire were caused by gasoline which ran out of the open outboard end of the discharge line on one of the barges, ignited by a fire in the galley stove of the Towboat REBEL WARRIOR, which was lying outside of the tow for the purpose of furnishing compressed air to start a Diesel engine on the cargo discharge pump of one of the barges. The District Judge found that the source of the gasoline was the Gulf Refining Company's wharf discharge line, and that it had been permitted to run into the barge discharge line by reason of the negligence of one of Gulf's employees, Villa LeBlanc, in negligently and prematurely opening a wharf valve. The District Judge, therefore, held that Gulf and Black Warrior Towing Company were equally guilty of negligence, Gulf because its employee negligently and prematurely opened the wharf valve permitting gasoline to flow into the barge's discharge line, and Black Warrior for failure to have closed off the end of the discharge line with a blank flange. The District Judge found equal causation of the fire and explosion in Gulf's negligent act in opening the wharf valve

prematurely, and in Black Warrior's conduct [1] and, accordingly, the District Judge held both Gulf and Black Warrior equally at fault [2] and apportioned the property damages between them on the basis of 50% to each. The Court of Appeals affirmed the District Court in this regard.[3]

REASONS FOR REFUSING THE WRIT

(1)

Of course, the inclusion of the important factor [4] of Gulf's negligence equal to that of Black Warrior's, presents an entirely different legal situation than that presented by the petition. There is presented a legal situation of a *tort feasor* seeking contribution from a joint *tort feasor* identical with that presented to this Court in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282; 72 S. Ct. 277, wherein Your Honors held that there could be no contribution between joint *tort feasors* in non-collision cases. *Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Corporation*, 350 U.S. 124; 76

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[1] The statement in the last paragraph on Page 5 of the Petition, that the District Judge had found the proximate cause of the accident was the conduct only of Black Warrior, is inaccurate and incomplete, because it disregards the finding of the District Judge of equal proximate causation in negligently and prematurely opening the dock valve by Gulf.

[2] "The trial court found [127 F. Supp. 474]: '[The] explosion * * * would not have occurred but for the premature opening of the gate valve by Gulf on one hand and the failure of Black Warrior to blank off the outboard discharge line of the 109 on the other. These concuring acts of negligence, equally effective, were the direct and proximate causes of the damage in suit.'" (230 F. 2d 351, note 3)

[3] "Neither can we challenge the court's assessment of fault as being equal between Gulf and Black Warrior.

"Agreeing, then, with the findings of fact of the trial court regarding the circumstances of the explosion and the assessment of fault equally between Gulf's employee and Black Warrior's employees, we may porceed to consider the separate libels filed in the court below." (230 F. 2d 351.)

[4] So important, that one of the Judges of the Court of Appeals was of the opinion that it was the sole cause of the fire and resulting explosion and that Black Warrior's conduct did not amount to negligence, by reason of which he dissented and wrote a dissenting opinion (230 F. 2d 356).

S. Ct. 232, has no application to this case, because there the Pan-Atlantic Steamship Corporation was an innocent party, and not a *tort feasor*, while in the case at bar we have presented the case of two parties found to have been in *pari delicto* and certainly, in the absence of a specific indemnification agreement whereby Black Warrior agreed to indemnify Gulf against liability for Gulf's own negligence, no such agreement can be inferred. Accordingly, the first reason for granting the writ alleged in the petition for the writ wholly disappears from the case.

(2)

The third reason for granting the writ presented by the petition, that the defense of the Fire Statute [5] was improperly considered by the Court of Appeals because invoked for the first time on appeal, is wholly without merit. Even if this were an affirmative defense, it would be properly within the discretion of the Court of Appeals to permit the defense to be raised on remand, such as was done in this case. However, we submit that the Fire Statute does not create an affirmative defense which must be plead; on the contrary, the Statute creates for the shipowner an exemption from liability for damage to cargo caused by fire, and places on one seeking to hold the shipowner liable therefor the burden of showing that the fire was due to the "design and neglect" of the shipowner,[6] a showing that must be made by the claimant as a condition precedent to recovery from the shipowner. Accordingly, in the case at bar, the Court of Appeal should have considered the effect of the Fire Statute and whether petitioner had carried its burden of proof, and not instructed the District Court to consider

[5] Appendix A to this brief. (*Post*, page 9)

[6] *Fidelity-Phoenix Insurance Company v. Flota Mercante Del Estado* (5 C.A.), 205 F. 2d 886.

it on remand, but this is an error of which the Petitioner cannot and of which we do not complain here.

(3)

The foregoing are all the legal issues that are involved in Gulf Refining Company v. Black Warrior Towing Company. However, we assume that the petition for writ of certiorari is intended to cover all of the kindred cases listed in Appendix E to the petition,[7] so we discuss here Petitioner's other two reasons for the granting of a petition as they apply to these other cases.

The Petitioner complains that the Court of Appeals "has rejected the facts found by the District Court and has decided contrary to [District] Judge Wright's findings of fact that (a) Lamy was not guilty of negligence, and (b) Morrissette was not guilty of negligence, and declared both free from negligence without manifest error, contrary to the rule announced in the decision of this Court in *McAllister v. United States*, 348 U.S. 19; 75 S. Ct. 6."[8] We submit that this complaint is wholly groundless for the reason that the Court of Appeals did not reject one single fact found by the District Judge or add one single fact to his findings. The Court of Appeals adopted in *toto* the findings of fact of the District Judge, but found that the conduct of Lamy and Morrisette, as determined by the District Judge, did not constitute negligence in either case as a matter of law, which is properly within the province of the Court of Appeals, and was so recognized in the *McAllister* Case.

The Petitioner also complains that it would be inequitable to permit Black Warrior to be released fully

[7] Page 52.
[8] Petition, pages 2-3.

from responsibility to the tort claimants such as Thomas,[9] Curry,[10] Morrisette,[11] and Hartford,[12] and that "in no event should Gulf be called upon to bear the full and entire economic burden of these claims."

We submit that because Gulf was a joint *tort feasor*, in *pari delicto* with Black Warrior, Gulf cannot secure a contribution from Black Warrior in any of these cases, because *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282; 72 S. Ct. 277, provides a bar to such contribution. In addition, as regards the *Lamy* Case, this issue has been disposed of by Your Honors in *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406; 74 S. Ct. 202. There the identical question was presented to Your Honors. In that case Hawn, an employee of Haenn Ship Ceiling & Refitting Corporation (hereinafter called Haenn) sued a vessel owner, Pope & Talbot, Inc., for damages for personal injury occasioned as a result of the ship's unseaworthiness. Hawn received from his employer Haenn compensation payments under the Federal Longshoremen's & Harbor Workers' Compensation Act and Pope & Talbot argued that any judgment against it would result in a double recovery by Hawn, and that to allow him to repay Haenn would result in relieving the employer, whose negligence contributed to the injury, of liability

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[9] Granted a decree for damages for personal injuries against Gulf, with a 5% reduction for Thomas' negligence.

[10] Granted a decree for damages for personal injuries against Gulf, with a 5% reduction for Curry's negligence.

[11] Morrissette found not guilty of negligence by the Court of Appeals and the case remanded to assess his widow's damages.

[12] Suit by Hartford Accident & Indemnity Company against Gulf Refining Company and its employee, Villa LeBlanc, who negligently and prematurely opened the dock valve, for reimbursement of compensation which Hartford Accident & Indemnity Company, as Black Warrior's insurance carrier, has been paying and will pay to Lamy's widow and children under the Federal Longshoremen's & Harbor Workers' Compensation Act, and for an additional amount of damages for the benefit of these survivors. Lamy was held not guilty of negligence by the Court of Appeals.

therefor. Your Honors disposed of this question in no uncertain terms, saying:

> "The Court of Appeals reversed the judgment for contribution by Haenn on the basis of our holding in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 72 S. Ct. 277, 96 L. Ed. 318. In that case we held that contribution could not be exacted under circumstances like those here involved.[13] * * *.
>
> * * * * *
>
> "SECOND. Haenn has been making compensation payments to Hawn because of obligations imposed by the Longshoremen's and Harbor Workers' Compensation Act,. 44 Stat. 1424, 33 U.S.C. § 901 *et seq.*, 33 U.S.C.A. § 901 *et seq.* Hawn has agreed to refund these payments to his employer out of his Pope & Talbot recovery. Pope & Talbot contends that the judgment against it should be reduced by this amount.
>
> "It points out that Hawn's verdict includes sums for past loss of wages and medical expenses which it is argued were the very items on account of which Hawn's employer paid him. Consequently Pope & Talbot says that if Hawn keeps the money he will have a double recovery and that to allow him to repay Haenn would give an unconscionable reward to an employer whose negligence contributed to the injury. A weakness in this ingenious argument is that § 33 of the Act has specific provisions to permit an employer to recoup his compensation payments out of any recovery from a third person negligently causing such injuries. Pope & Talbot's contention if accepted would frustrate this purpose to protect employers who are subjected to absolute liability by the Act. Moreover, reduction of Pope & Talbot's liability at the expense of Haenn would be the substantial

[13] 346 U.S. 408; 74 S. Ct. 204.

equivalent of contribution which we declined to require in the *Halcyon* case." [14]

CONCLUSION

We, therefore, submit that there is no valid question of law posed by this petition for a writ of certiorari which has not been already disposed of by Your Honors in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282; 72 S. Ct. 277, and *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406; 74 S. Ct. 202, and that the petition should be denied.

Respectfully submitted,

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[14] 346 U.S. 411; 74 S. Ct. 206.

APPENDIX A

U. S. FIRE STATUTE, 46 U. S. CODE 182.

Sec. 182. LOSS BY FIRE. No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner. (R.S. Sec. 4282).